# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2–3 |
| Statement | 3 |
| Argument | 6 |
| Conclusion | 21 |


CITATIONS

Cases:


| | |
|---|---|
| *Adickes* v. *Kress & Co.*, 398 U.S. 144 | 10 |
| *Alderman* v. *United States*, 394 U.S. 165 | 14, 15 |
| *Chambers* v. *Mississippi*, 410 U.S. 284 | 17 |
| *Lawn* v. *United States*, 355 U.S. 339 | 10 |
| *Nevada Tax Commission* v. *Hicks*, 73 Nev. 115, 310 P.2d. 852 | 8 |
| *Rewis* v. *United States*, 401 U.S. 808 | 8 |
| *United States* v. *Archer*, 486 F.2d 670 | 8 |
| *United States* v. *Branker*, 395 F.2d 881 | 18 |
| *United States* v. *Carter*, 311 F.2d 934 | 20 |
| *United States* v. *Glick*, 463 F.2d 491 | 10 |
| *United States* v. *Gordon*, 464 F.2d 357 | 8 |
| *United States* v. *Harris*, 458 F.2d 670 | 18 |
| *United States* v. *Jorgenson*, 451 F.2d 516, certiorari denied, 405 U.S. 922 | 10 |
| *United States* v. *Kelly*, 349 F.2d 720 | 17 |
| *United States* v. *Larkin*, 417 F.2d 617 | 10 |
| *United States* v. *McCoy*, 429 F.2d 739 | 10 |
| *United States* v. *Marion*, 404 U.S. 307 | 16 |
| *United States* v. *Palladino*, 475 F.2d 65 | 10 |
| *United States* v. *Smith*, 411 F.2d 733 | 10 |
| *United States* v. *Spector*, 326 F.2d 345 | 17 |
| *United States* v. *Stagman*, 446 F.2d 489 | 9 |

Statutes:


| | Page |
|---|---|
| Jencks Act, 18 U.S.C. 3500 | 12 |
| Travel Act, 18 U.S.C. 1952 | 3, 6 |
| 18 U.S.C. 371 | 3 |
| 18 U.S.C. 1955 | 8 |
| Bus. Corp. Law § 906(b) (3), McKinney's Consolidated Laws of New York Annotated | 20 |

# In the Supreme Court of the United States

OCTOBER TERM, 1974

---

No. 74-283

EMPRISE CORPORATION, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 74-322

MICHAEL SANTO POLIZZI, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

No. 74-323

ANTHONY GIORDANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A),[1] as modified (Pet. App. C), is reported at 500 F. 2d 856.

[1] "Pet. App." as used herein refers to the appendix to the petition in No. 74-322.

## JURISDICTION

The judgment of the court of appeals was entered on April 30, 1974. Petitions for rehearing were denied on July 25, 1974. Mr. Justice Douglas extended the time for filing the petition for a writ of certiorari in No. 74–283 to September 16, 1974, and in Nos. 74–322 and 74–323 to September 23, 1974, and the petitions were filed on those respective dates. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Travel Act proscribes the use of interstate facilities to carry on a gambling enterprise in violation of a state law that prohibits the sharing in the proceeds of such an enterprise by persons whose identities have not been disclosed in the application for a gaming license.

2. Whether the phrase "intent to * * * facilitate the * * * carrying on of any unlawful activity" in the Travel Act refers to specific intent personally to violate state law or to specific intent to facilitate the carrying on of an activity that is itself known to be in violation of state law.

3. Whether prejudicial publicity deprived petitioners of a fair trial.

4. Whether petitioners were prejudiced by the inclusion of petitioners Polizzi and Zerilli on a Department of Justice list of known Mafia figures or by use of the term "Mafia" before the grand jury or at trial.

5. Whether the use of a prior consistent statement to rehabilitate a government witness and the late disclosure of that statement to the defense constituted reversible error.

6. Whether the government made undisclosed promises of leniency to a prosecution witness.

7. Whether the district court was correct in its conclusion, reached after an *Alderman* hearing, that the evidence at trial was untainted by unlawful electronic surveillance.

8. Whether the cumulative effect of alleged errors resulted in the denial of a fair trial.

9. Whether the evidence against petitioner Giordano was either improperly admitted or insufficient to sustain his conviction.

10. Whether the district court abused its discretion in denying petitioner Giordano's motion for severance.

11. Whether it was proper to instruct the jury that it could consider as to petitioner Giordano evidence admitted after he had rested at the close of the government's case.

12. Whether petitioner Emprise Corporation, as the survivor of a statutory merger between a parent corporation and its subsidiary, is liable for criminal acts committed by the subsidiary prior to the merger.

## STATEMENT

After a ten-week jury trial in the United States District Court for the Central District of California, all petitioners were convicted of conspiracy to violate the Travel Act, 18 U.S.C. 1952, in violation of 18 U.S.C. 371, and petitioners Polizzi, Shapiro, Bellanca, and Zerilli were additionally convicted of numerous substantive violations of the Travel Act. Petitioners received the following sentences: Polizzi, six concurrent terms of four years' imprisonment and an aggre-

gate fine of $40,000; Sapiro, six concurrent terms of three years' imprisonment and an aggregate fine of $30,000; Bellanca, seven concurrent terms of five years' imprisonment, all but 179 days of which were suspended, and an aggregate fine of $20,000; Giordano, a term of four years' imprisonment and a fine of $10,000; Rocks, a term of five years' imprisonment, all but 90 days of which were suspended, and a fine of $10,000; Zerilli, eight concurrent terms of four years' imprisonment and an aggregate fine of $40,000; and Emprise Corporation, a fine of $10,000. The court of appeals affirmed in a comprehensive and lengthy opinion (Pet. Apps. A and C; 500 F. 2d 856).[2]

The facts are set forth in detail in the government's brief in the court of appeals (at pp. 4–114).[3] Briefly, the government proved that Zerilli and Polizzi, aided by their co-conspirators, obtained hidden control of and operated a gambling enterprise in Las Vegas, Nevada, in violation of Nevada criminal law. In carrying on this unlawful activity petitioners conspired to use, and certain of them did use, various interstate facilities, thereby violating the Travel Act.

In March 1966, the opportunity arose for Polizzi and Zerilli to acquire control of Vegas Frontier, Inc. (hereafter "VFI"), a Nevada corporation that was to operate the Frontier Hotel and Casino pursuant to

---

[2] Errata in the original opinion of April 30, 1974 (Pet. App. A) were corrected in the modified opinion of July 25, 1974 (Pet. App. C). References herein to the court's opinion will be made both to the reported opinion, which contains the text of the opinion as modified, and to Pet. Apps. A and C.

[3] A copy of the government's brief below has been lodged with the Clerk of this Court.

a gambling license. However, the Nevada Gaming Control Board informally advised them that any application for a gambling license on behalf of a corporation in which they held a major interest would be denied. Thereafter Polizzi and Zerilli, acting covertly through petitioners Bellanca and Shapiro, purchased the controlling interest in VFI and caused election of a board of directors that would carry out their orders concerning the operation of the enterprise. Throughout 1966 and 1967, Polizzi, Zerilli, Bellanca, and Shapiro made all the major corporate decisions. In June 1967, the Nevada gaming authorities conducted a hearing into the gambling application of VFI and its stockholders, but petitioners were successful in concealing Polizzi's and Zerilli's control and participation in the management of the corporation.

The other petitioners—Rooks, Giordano, and Emprise Corporation—participated in the conspiracy by loaning money to VFI at Zerilli's request. In April 1966, Emprise Corporation[4] loaned petitioner Rooks approximately one-half million dollars to purchase stock in VFI; this loan was arranged by

[4] Prior to March 17, 1970, petitioner Emprise Corporation was named "High Park Corporation." Until March 1, 1970, High Park Corporation owned all the shares of another New York corporation, also named "Emprise Corporation." On March 1, 1970, the former Emprise merged into High Park Corporation, and on March 17, 1970, High Park changed its name to Emprise Corporation. All references to Emprise Corporation's participation in the conspiracy are to the acts of the former Emprise Corporation. The liability of petitioner Emprise Corporation for the acts of its predecessor namesake corporation is discussed at pp. 20–21, *infra*.

Zerilli and Bellanca to assist their purchase of a controlling stock interest in the corporation. Rooks was a "front man" who was investing on behalf of his co-conspirators. Emprise Corporation on two other occasions made substantial loans to Zerilli, Bellanca, and others to insure the success of the conspiracy's objective. In later stages of the conspiracy, when further funding by Emprise would have risked exposure of the conspiracy, Giordano lent funds to Zerilli on two separate occasions.

## ARGUMENT

1. Petitioner Emprise Corporation contends (Pet. 9–14) that the Travel Act, 18 U.S.C. 1952, which proscribes generally the use of interstate facilities to carry on a gambling enterprise in violation of state law, nevertheless does not reach the use of such facilities to carry on a gambling enterprise in violation of a state law that prohibits the sharing in the proceeds of such an enterprise by persons whose identities have not been disclosed in the application for a gaming license. This contention was properly rejected by the court of appeals in an opinion (Pet. App. A–4 to A–12; 500 F. 2d at 869–874) upon which we rely.

After analyzing the appropriate Nevada statutes, the court of appeals concluded that the gambling enterprise carried on by petitioners violated the criminal law of Nevada because its proceeds were distributed without compliance with applicable disclosure requirements. Petitioners do not argue that the court of appeals misinterpreted or misapplied Nevada law. Rather, the claim is that the violation was relatively

minor and did not relate directly to the actual conduct of the gambling enterprise. Although characterization of the state offense as minor is of doubtful accuracy—it was punishable by a fine of not less than $1,000 or imprisonment for not less than six months, or both (see Pet. App. A–10, n. 15; 500 F. 2d at 873, n. 15)—the seriousness of the state offense is in any event irrelevant under the Travel Act, which is concerned solely with whether the activity was lawful or unlawful. And the distribution of proceeds is of course integral to the conduct of a gambling enterprise. Furthermore, petitioners' failure to disclose strikes at the heart of Nevada's regulation of gambling:

> For gambling to take its place as a lawful enterprise in Nevada it is not enough that this state has named it lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this state, but for the entire nation. Organized crime must not be given refuge here through the legitimatizing of one of its principal sources of income. Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized.
>
> * * * The risks to which the public is subjected by the legalizing of this otherwise unlawful activity are met solely by the manner in which licensing and control are carried out.

[*Nevada Tax Commission* v. *Hicks*, 73 Nev. 115, 119–120, 310 P. 2d 852, 854.]

The Travel Act was expressly designed to overcome the difficulties encountered by the states in enforcing gambling and other similar criminal laws. *Rewis* v. *United States*, 401 U.S. 808, 811.[5] Accordingly, the Travel Act was properly interpreted and applied here.

2. Petitioner Emprise Corporation contends (Pet. 15–16) that the district court gave an erroneous instruction regarding the specific intent required to prove a conspiracy to violate the Travel Act. That contention is based upon the erroneous assumption that the Travel Act requires that the accused intend personally to commit a violation of state law. But, as the court of appeals correctly demonstrated (Pet. App. A–16, C–2; 500 F. 2d at 876–877), neither the language nor the purpose of the Act supports such a construction. The only intent required by the Act is

---

[5] *United States* v. *Archer*, 486 F. 2d 670 (C.A. 2), and *United States* v. *Gordon*, 464 F. 2d 357 (C.A. 9), cited by petitioner Emprise Corporation (Pet. 12–14), are inapposite. *Archer* involved corruption in a local prosecutor's office and had no interstate aspects. *Gordon* held only that 18 U.S.C. 1955 does not encompass violations of state civil law.

Petitioner Emprise Corporation also contends (Pet. 27–28) that its conviction should be reversed because the jury may have convicted on the theory, which the court of appeals held to be invalid, that the defendants violated Nevada law because they did not hold gambling licenses. This contention is without merit. The trial court charged the jury that "any gambling conducted by or through VFI would not be illegal," because the corporation itself was licensed (Pet. App. A–6, n. 6; 500 F. 2d at 870, n. 6). There was therefore no question concerning petitioners' failure to obtain licenses individually (see Pet. App. A–6; 500 F. 2d at 870–871).

the intent to facilitate the carrying on of an activity or enterprise that is itself known by the accused to be in violation of state law. That was the holding below.[6] Petitioner Emprise Corporation's statement that the decision below "does not require the prosecution to establish specific knowledge that local law has been violated" (Pet. 15) is incorrect.

3. Petitioners contend (Polizzi Pet. 18–21) that they were deprived of a fair trial by prejudicial publicity both before and during the trial and that the trial judge failed to take adequate measures to detect and prevent that prejudice. This contention was correctly rejected by the court of appeals for the reasons stated in its opinion (Pet. App. A–19 to A–33; 500 F. 2d at 878–887), upon which we rely. The court, after reviewing the evidence relating to publicity, concluded that "the pretrial publicity * * * was not substantial enough to have required the trial judge to interrogate the prospective jurors at length about it" (Pet. App. A–21; 500 F. 2d at 880) and that the trial judge's careful admonitions and *in camera* interrogations of the individual jurors concerning publicity during trial fully protected petitioners against prejudice.

In a related contention, petitioners argue (Polizzi Pet. 21–24) that their right to counsel was violated

[6] Contrary to petitioner Emprise Corporation's claim, the decision below does not conflict with *United States* v. *Stagman*, 446 F. 2d 489 (C.A. 6). The court in *Stagman* merely rejected the argument that the Travel Act "does not require knowledge that the *activity* is unlawful" (446 F. 2d at 492; emphasis added). Petitioners here were shown to have known that the gambling activity was unlawful.

when the district judge questioned jurors *in camera*, but on the record, about prejudicial publicity. This contention may not have been properly raised in the court of appeals.[7] Cf. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, the contention is without merit. It was within the trial judge's discretion to question jurors privately about the possible effect of prejudicial publicity in order to reduce the adversary atmosphere that the presence of six defendants and their counsel would have created. Furthermore, any possible prejudice was obviated by the presence of a court reporter, who transcribed the conversations. *United States* v. *Jorgenson*, 451 F. 2d 516 (C.A. 10), certiorari denied, 405 U.S. 922.[8]

[7] Petitioners attempted to raise this issue in a supplemental petition for rehearing with suggestion for rehearing *en banc*, which the court of appeals denied (Emprise Pet. App. D).

[8] The cases cited by petitioners are inapposite. In *United States* v. *Glick*, 463 F. 2d 491, 494 (C.A. 2), the trial judge had delivered to the jury a "highly prejudicial" and erroneous instruction without counsel being present. In *United States* v. *Palladino*, 475 F. 2d 65, 75 (C.A. 1), the court stated in dictum that counsel should have been present when the jury was questioned, citing *United States* v. *Larkin*, 417 F. 2d 617, 618 (C.A. 1), which held a similar absence of counsel to be harmless error. In *United States* v. *McCoy*, 429 F. 2d 739, 742 (C.A.D.C.), when the jury was polled, one juror answered "yes, with a question mark." The conviction was reversed because the juror was subsequently questioned by the court alone, without the defendant, his attorney, or even a court reporter. In *United States* v. *Smith*, 411 F. 2d 733, 736–737 (C.A. 6), the conviction was reversed because the verdict was taken in the absence of defense counsel.

4. Petitioners contend that they were prejudiced because Polizzi and Zerilli were included on a Department of Justice list of known Mafia figures (Polizzi Pet. 13, 17), because the term "Mafia" was used once before the grand jury that returned the instant indictment (Polizzi Pet. 13–14), and because the government asked Polizzi on cross-examination about his reputation, to which Polizzi answered that he was considered a member of the Mafia (Polizzi Pet. 14–15). These contentions were correctly rejected by the court of appeals for the reasons stated in its opinion (Pet. App. A–33 to A–37, C–2-C–3; 500 F. 2d at 887–889). The court determined that the alleged Mafia connections of Polizzi and Zerilli had neither prompted initiation of the prosecution nor biased the grand jury. The court also pointed out that the question asked of Polizzi on cross-examination had been proper and could have been answered truthfully without mention of the Mafia.

Petitioners additionally complain of the prosecutor's reference to the Mafia during his summation. The prosecutor stated (Appellants' Opening Brief below, pp. 166–167):

> All this business that you have heard about the Mafia in this case, and the reason why Mr. Polizzi says he couldn't get licensed, and which is the actual reason * * * let me say this * * * That evidence would never have had to come into this case except for the defense that was advanced, it would never have been mentioned, never.

It is difficult to see how this statement prejudiced the jury against petitioners. Polizzi himself had brought up his alleged connection with the Mafia. The prosecutor was simply trying to make it clear to the jury that the government placed no weight on any such allegation and was prosecuting petitioners only for the specific acts proven at trial.

5. Petitioners contend (Polizzi Pet. 36–38) that the government improperly used a prior statement (the Lands transcript) to rehabilitate Maurice Friedman,[2] the government's chief witness, and (Polizzi Pet. 34–36) that Friedman's testimony should have been stricken because the late disclosure of the Lands transcript violated the Jencks Act, 18 U.S.C. 3500. These contentions were correctly rejected by the court of appeals for the reasons stated in its opinion (Pet. App. A–44 to A–48, C–4; 500 F. 2d at 893–896). The court concluded (1) that since the probative value of the Lands transcript as a prior consistent statement was insubstantial and its references to the Mafia and Cosa Nostra were potentially prejudicial, the trial court erred in admitting testimony with respect to it, but (2) that the error was harmless in view of the fact that Friedman avoided reference to the prejudicial material in his testimony with respect to the transcript and was subjected to intense and effective cross-examination that brought out the weakness of the transcript as a prior consistent statement. The court further determined that petitioners were not prejudiced by untimely disclosure of the transcript,

[2] Maurice Friedman was the principal promoter of the Frontier Hotel venture and was a shareholder and member of the board of directors of VFI.

since it had been immediately made available to them when its relevance became apparent upon cross-examination."[10]

6. Petitioners contend (Polizzi Pet. 38–41) that the government failed to disclose promises of leniency made to Maurice Friedman. The court of appeals reviewed petitioners' evidence and arguments on this point and correctly determined that the prosecution made no undisclosed promises to Friedman (Pet. App. A–48 to A–50, C–3, C–4; 500 F. 2d at 896).

Petitioners now allege two newly discovered instances of supposedly favored treatment of Friedman. Neither instance involved any agreement nor in fact involved favored treatment. (1) The misconduct investigation against Friedman at the Lompoc Prison Camp was dropped because there was no evidence that Friedman had done anything wrong. As the prosecutor stated during the trial that resulted from the misconduct investigations, "I have been told that there is absolutely no understanding between Mr. Friedman and anyone in the government that he would not be prosecuted [for any part he may have played in official misconduct at the Lompoc Prison Camp]" (Brief

[10] The thrust of petitioners' complaint about the failure to receive the Lands transcript prior to cross-examination seems to be that earlier disclosure would have prevented defense counsel from asking Friedman, "Isn't it true that the first time you told anybody there was a hidden interest was after your conviction for perjury?" Although defense counsel might not have asked this question, they would certainly have attempted to establish a motive to fabricate by asking Friedman about alleged promises of prosecutorial leniency (see pp. 13–14, *infra*), and the government still would have been able to use Friedman's prior statement to rebut the inference of recent fabrication.

for the United States in *United States* v. *Allessio*, No. 73-2904 (C.A. 9), p. 61, n. 21). (2) Friedman was housed in an apartment rather than in jail before and during the instant trial to ensure his safety. The apartment was always guarded, and a United States marshal remained in the apartment with Friedman.

7. Petitioners Zerilli, Polizzi and Giordano were subject to warrantless electronic surveillance between 1962 and 1965. Although the conspiracy here was instituted only later, in 1966, the district court held an *Alderman* hearing to determine whether the trial had been materially tainted by the unlawful surveillance. Petitioners contend (Polizzi Pet. 24-34) that the district court erred in finding no taint. We rely upon the discussion of the court of appeals rejecting that contention (Pet. App. A-71 to A-78, C-3 to C-4; 500 F. 2d at 909-913). The court carefully considered the record and concluded that petitioners had failed to "go forward with specific evidence demonstrating taint" (*Alderman* v. *United States*, 394 U.S. 165, 183); the court further held that it had not been error not to require the testimony of all FBI personnel who had monitored their conversations, in view of the fact that the prosecutors' own testimony showed that "no member of the prosecution team had read the logs or had any information derived from them when the indictments were handed down" (Pet. App. A-77; 500 F. 2d at 913).

We add only that petitioners err in contending (Polizzi Pet. 32) that the decision below conflicts with those of other courts of appeals on the question

whether FBI monitors must testify at *Alderman* hearings. The decisions cited by petitioners involve, at most, instances where denial of a suppression motion has been affirmed in part on the basis of the testimony of FBI monitors. As the court of appeals below noted, "[w]hile FBI monitors have testified at some taint hearings, there is no rule that they must testify" (Pet. App. A–78, C–4; 500 F. 2d at 913).

8. Petitioners contend (Polizzi Pet. 41–48; Emprise Pet. 21–28) that the cumulative effect of numerous harmless trial errors resulted in the denial of a fair trial and that the court of appeals did not appreciate this cumulative effect because no one judge wrote the entire opinion. This contention is without merit. The panel issued a unanimous opinion, each judge joining in the parts written by the other two judges, and the court explicitly stated (Pet. App. A–43; 500 F. 2d at 892):

> In this case the trial judge clearly did his best to give appellants a fair trial. *Compare United States* v. *Dellinger,* 472 F. 2d 340, 385–391 (7 Cir. 1972), *cert. denied,* 410 U.S. 970 (1973). Errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal. * * * Appellants have failed to make a persuasive showing that their constitutional rights were violated, and our careful review of the entire record does not lead to a reasonable inference that the jury's verdicts were the end result of anything other than an impartial consideration of properly admitted evidence.

9. Petitioner Giordano contends (Pet. 18–26) that the evidence was insufficient to sustain his conviction, that telephone and hotel records were improperly admitted into evidence,[11] and that the testimony of two adverse witnesses called by the government established his innocence. These contentions were thoroughly considered and properly rejected by the court of appeals (Pet. App. A–61 to A–65; 500 F. 2d at 903–906).

The court of appeals reviewed the evidence against Giordano in considerable detail and concluded that the jury could properly have found that Giordano joined the conspiracy, arranged for an investment of $150,000 in VFI, and travelled to Las Vegas to watch over his hidden interest in VFI and to participate in various key decisions. The court also held that telephone and hotel records were properly submitted as circumstantial evidence tending to show, along with other circumstantial evidence, Giordano's participation in the conspiracy. Regarding the alleged exculpatory testimony of the two adverse witnesses called by the government, the court of appeals correctly noted that the notion that a party is bound by the

[11] Petitioner Giordano's related contention (Pet. 32–35), that he was prejudiced by pre-indictment delay due to the routine destruction of other hotel records, is frivolous. His claim is merely that such records might have refreshed his recollection of why, and with whom, he had travelled to Las Vegas. This bare claim falls far short of showing "that the pre-indictment delay * * * caused substantial prejudice to [petitioner's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion*, 404 U.S. 307, 324.

testimony of its witnesses has long been discredited. See also *Chambers* v. *Mississippi*, 410 U.S. 284, 296.

10. Petitioner Giordano also contends (Pet. 27–32, 39–42) that the district court abused its discretion in denying his motions for severance. This contention is without merit for the reasons stated by the court of appeals (Pet. App. A–57 to A–60; 500 F. 2d at 901–902). The court correctly observed that "a joint trial is particularly appropriate where conspiracy is charged" (Pet. App. A–58; 500 F. 2d at 901), that "it is difficult to understand how Giordano could have benefited from severance, for evidence of the acts and statements of other defendants pursuant to and in furtherance of the conspiracy would have been admissible against Giordano if tried alone" (*ibid.*), and that "[t]he trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him" (Pet. App. A–59; 500 F. 2d at 902).[12]

[12] The cases cited by petitioner are inapposite. In *United States* v. *Spector*, 326 F. 2d 345 (C.A. 7), the only link between the conspiracy and substantive counts was a common co-defendant. The court held that this link was insufficient to warrant a joint trial. In the instant case the substantive counts involved acts committed pursuant to the conspiracy. In *United States* v. *Kelly*, 349 F. 2d 720, 756–759 (C.A. 2), the co-defendant aggrieved by the joinder was not even mentioned during the first two months of trial, proof of his participation in the conspiracy was "tenuous and unsubstantial", and there was no effort by the trial judge to distinguish him from the other defendants. In the instant case petitioner Giordano was proven to have been an important source of funds for the conspiracy by substantial, albeit circumstantial, evidence, and, as the court of appeals pointed out, the trial judge took great pains to pro-

11. Petitioner Giordano further contends (Pet. 35–39) that the court should have instructed the jury not to consider as to him evidence admitted after he had rested at the close of the government's case. This contention also is answered by the opinion of the court of appeals (Pet. App. A-60 to A-61; 500 F. 2d at 902–903):

> Giordano rested at the close of the government's case-in-chief. He asked for a jury instruction that no evidence introduced thereafter could be considered against him. The request was denied. Giordano's co-defendants then testified in their own defense. In arguing the case to the jury, the government drew implications from this testimony adverse to Giordano.
>
> Giordano's decision not to offer evidence in his own behalf preserved his right to a review of the denial of his motion for acquittal on the basis of the government's evidence alone. *See United States* v. *Figueroa-Paz*, 468 F. 2d 1055, 1058 (9th Cir. 1972). But this is not to say, if denial of the motion to acquit was

---

tect his right to an independent evaluation of the evidence against him. In *United States* v. *Branker*, 395 F. 2d 881, 887–889 (C.A. 2), the prosecution relied upon the conspiracy charge to join eight defendants in a case involving an additional 80 substantive counts. During the trial the conspiracy count was dismissed, and because the case was so complex, making it difficult for the jurors to keep the various defendants separate in their minds, the court held that four of the defendants should have been severed for trial on the substantive counts. In the instant case Giordano was charged only in the conspiracy count, which was not dismissed during trial. In *United States* v. *Harris*, 458 F. 2d 670, 672–674 (C.A. 5), the court upheld the denial of severance, holding that the defendants had the burden of proving prejudice from the joinder and that the mere sitting together during trial did not carry that burden.

proper, that the jury was not entitled to consider *all* of the evidence, including that presented by Giordano's co-defendants, in determining Giordano's guilt.

Evidence offered in defense in the trial of a single defendant is available for all purposes, and the rule is the same in a joint trial of multiple defendants—evidence offered by one may support the conviction of the others. *See Rickey* v. *United States,* 242 F. 2d 583, 586 (5th Cir. 1957); *Maupin* v. *United States,* 225 F. 2d 680, 682 (10th Cir. 1955). This court has held that the same rule is applicable even to a defendant who has rested at the close of the government's case, and an instruction of the kind sought by Giordano is therefore properly refused. *Brown* v. *United States,* 56 F. 2d 997, 999–1000 (9th Cir. 1932).

There is a substantial reason for the rule. One purpose of a joint trial of defendants allegedly involved in a single scheme is to facilitate evaluation by the jury of the evidence against each defendant in light of the entire course of conduct. "Such procedure not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete over-all view of the whole scheme and helps them to see how each piece fits into the pattern." *Rakes* v. *United States,* 169 F. 2d 739, 744 (4th Cir. 1948). *See* ABA Standards Relating to Joinder and Severance 39 (Approved Draft 1968). This purpose of joinder would be frustrated as to a particular defendant if he could bar consideration as to him of some of the relevant evidence by resting before that evidence was introduced. [Footnotes omitted.]

12. Finally, petitioner Emprise Corporation contends (Pet. 17–21) that it is not liable under the Travel Act for criminal acts committed by its former subsidiary. This contention was correctly rejected by the court of appeals (Pet. App. A–66 to A–70; 506 F. 2d at 906–909), which pointed out that the governing state law expressly makes the corporation surviving a merger responsible for the liabilities, obligations, and penalities of the corporations absorbed in the merger.[13]

Petitioner errs in suggesting that the decision below conflicts with *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied, 373 U.S. 915. Although the Sixth Circuit in *Carter* did express its view that an acquiring corporation would not be liable for the prior criminal acts of an acquired corporation, that issue was not before the court, and its statement did not form the basis of its decision. The court there reversed the conviction of an acquiring corporation because the corporation had been charged and tried on the theory that it had committed the offense itself and the evidence was insufficient to establish the charge (311 F. 2d at 941).[14] Here, by contrast, petitioner

[13] Although the court of appeals did not note it, Bus. Corp. Law § 906(b)(3), McKinney's Consolidated Laws of New York Annotated, which provides for the carryover of liabilities, in its last sentence refers expressly to criminal as well as civil proceedings. It is therefore clear that the statute makes the surviving corporation both criminally and civilly liable for prior acts of its merged constituent.

[14] The acquired corporation was separately charged and convicted, and its conviction was upheld in *Carter* (311 F. 2d at 941-944).

Emprise Corporation was charged as a successor corporation and tried on that theory.

Moreover, the policy considerations upon which petitioner relies as arguably showing the undesirability of attaching criminal liability to the innocent survivor of a merger between two unrelated corporations obviously have no application where, as here, the offense was committed by the former subsidiary of the surviving parent.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*
HENRY E. PETERSEN,
*Assistant Attorney General.*
PETER M. SHANNON, JR.,
MARC PHILIP RICHMAN,
*Attorneys.*

DECEMBER 1974.